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OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., ET AL.,
APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL APPELLEES

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QUESTION PRESENTED

Whether Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. 534 and 535 (to be codified at Supp. IV 1992), which require cable system operators to devote a portion of their channel capacity to the carriage of certain commercial broadcast stations and noncommercial educational broadcast stations, violate the First Amendment.

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OPINION BELOW

The opinion of the district court (J.S. App. 1a-72a) is reported at 819 F. Supp. 32.

JURISDICTION

These consolidated cases were heard by a three-judge district court convened pursuant to 47 U.S.C. 555(c)(1) (to be codified at Supp. IV 1992) and 28 U.S.C. 2284. The judgment of the district court was entered on April 12, 1993. On May 3, 1993, notices of appeal were filed pursuant to 47 U.S.C. 555(c)(2) (to be codified at Supp. IV 1992). This Court noted probable jurisdiction on September 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech, or of the press."

The relevant provisions of the Cable Television Consumer Protection and Competition Act of 1992 are reprinted in the Joint Appendix at pages 3 through 33.

STATEMENT

Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4, 5, 106 Stat. 1471-1481, after concluding that anti-competitive practices in the cable industry threaten to limit the availability of broadcast television. The 1992 Cable Act seeks to preserve the vitality of broadcast television by requiring cable operators to devote a limited portion of their channel capacity to commercial and educational broadcast stations. The Act does not punish, suppress, or promote any particular programming based on its content. The so-called "must-carry" requirements, enacted pursuant to detailed congressional findings made after hearings spanning several years, were specifically aimed at promoting the First Amendment interests of viewers—interests this Court has described as "paramount." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). After concluding that the 1992 Cable Act "is simply industry-specific antitrust and fair trade practice regulatory legislation," J.S. App. 13a, the three-judge district court sustained the must-carry provisions in the face of appellants' claim that they infringe free speech interests.

A. Statutory Background

1. The Federal Communications Commission began to regulate cable television in the 1960s, in the absence of express statutory authority relating to cable television,

on account of cable television's potential to harm broadcast television.[1] This Court held that the FCC had authority to regulate cable television because the Court agreed that cable television may " 'seriously degrade the service offered by a television broadcaster' * * * and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 175 (1968), quoting *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 700 (1965). The Court also noted the FCC's concern that cable television "might, by dividing the available audiences and revenues, significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters." 392 U.S. at 176. Congress later affirmed the FCC's authority over cable television by enacting the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.

From the outset, the FCC required cable operators "to transmit to their subscribers the signals of any station into whose service area they have brought competing signals." *Southwestern Cable*, 392 U.S. at 166. The FCC's broad must-carry regulation was invalidated on First Amendment grounds in 1985 by the D.C. Circuit in *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434, cert. denied, 476 U.S. 1169 (1986). The parties in *Quincy Cable* focused their arguments on whether the FCC's must-carry rule should be analyzed under the rationale of *United States* v. *O'Brien*, 391 U.S. 367 (1968), which provides that content-neutral restraints on speech that further significant governmental interests are permissible

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[1] Congress's concern that cable systems might harm broadcasters, particularly those serving smaller communities, dates to 1958, when the Senate Committee on Interstate and Foreign Commerce heard testimony that local stations had been hurt financially by the introduction of cable. *Television Inquiry: Hearings Before the Senate Comm. on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 3636-3643, 3708-3715 (1958); see also S. Rep. No. 923, 86th Cong., 1st Sess. 7-8 (1959).

if they are narrowly tailored, or under the strict scrutiny standard of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). The court of appeals did not decide that issue in *Quincy Cable*, but invalidated the FCC's must-carry regulation on the ground that, due to a lack of administrative record support, the must-carry regulation could not pass muster under either the *Tornillo* or *O'Brien* standard.[2]

2. Congress began studying the effects of the *Quincy Cable* decision in 1989.[3] Its hearings included much debate about the economic imbalances created in the telecommunications industry by the invalidation of the FCC's must-carry rules, and proponents of must-carry rules sought to meet anticipated First Amendment objections.[4] Because the court of appeals in *Quincy Cable* had based its decision on the lack of findings to support the FCC's must-carry rule, Congress enacted detailed factual findings supporting its must-carry rules.

Specifically, Congress found that "[f]or a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable

[2] Following *Quincy Cable*, the FCC commenced further rulemaking proceedings and subsequently adopted a more limited must-carry rule that would have been in effect for five years. However, that regulation was invalidated in *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988).

[3] See S. Rep. No. 92, 102d Cong., 1st Sess. 3-4 (1991) (describing cable hearings); H.R. Rep. No. 628, 102d Cong., 2d Sess. 74 (1992) (same); see also J.S. App. 10a (describing the legislative history of the 1992 Cable Act).

[4] See *Must Carry: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 1-4 (1989) (opening statements of Senators Inouye, Gore, and Burns, discussing *Quincy Cable*, *Century Communications*, *O'Brien*, and *Tornillo*). See also *Media Ownership—Diversity and Concentration: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 5 (1989) [hereinafter *Media Ownership Hearings*] (remarks of Sen. Gorton).

television system to serve a particular * * * area, most cable television subscribers have no opportunity to select between competing cable systems." § 2(a)(2), 106 Stat. 1460. In fact, the "[e]vidence received by Congress indicated that less than 1% of the cable operators in the nation face competition from other operators." J.S. App. 11a n.16. Congress also determined that there had been an "effective subsidy" of cable systems by local broadcasters since cable operators could carry broadcast signals subject only to the compulsory license provisions of the copyright laws. § 2(a)(19), 106 Stat. 1462; see J.S. App. 6a n.6.

Congress also found that the cable industry has become "highly concentrated," resulting in greater "barriers to entry for new programmers and a reduction in the number of media voices available to consumers." § 2(a)(4), 106 Stat. 1460. And because of increasing vertical integration in the industry, cable operators have an incentive to favor affiliated programmers, making it "more difficult for noncable-affiliated programmers to secure carriage on cable systems." § 2(a)(5), 106 Stat. 1460-1461. Congress based those findings on evidence showing that many cable programmers are owned by cable operators. For example, one of the owners of appellant Turner Broadcasting, a cable programmer, is Time Warner, the parent of appellant Time Warner Entertainment, which is both a cable operator and the owner of Home Box Office, another cable programmer. S. Rep. No. 92, 102d Cong., 1st Sess. 25 (1991); see also J.S. App. 111a, 112a. And while more detailed evidence was presented, it was summarized by the statement that "[y]ou don't need a Ph.D. in Economics to figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the *advantage* of the program services in which he has an equity investment and/or in which he is selling advertising availabilities, and to the *disadvantage* of those services, including local Independent broadcasting stations, in which he does *not* have an equity position."

S. Rep. No. 92, *supra*, at 26, quoting testimony of Preston Padden (INTV) in *Media Ownership Hearings* 308.

Further evidence showed that cable operators had "denied carriage of local television stations in approximately 3,600 instances," and that "[b]y far the most frequent replacement for a dropped local television station is a basic cable network—the program services in which cable operators often own equity interests and/or profit from local advertising sales." S. Rep. No. 92, *supra*, at 43. The evidence also showed that cable operators had shifted broadcast stations to less desirable channels, and that "[i]n almost every instance, the stations shifted have been replaced by a cable program service in which the system operator is selling advertising or in which the operator has an equity interest or both." *Id.* at 44.

At the same time, Congress found that more than 60% of all households with televisions have cable television, making cable television "a dominant nationwide video medium." § 2(a)(3), 106 Stat. 1460. Congress further found that "[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services." § 2(a)(17), 106 Stat. 1462.

After studying the problem, Congress reached a number of conclusions, two of which are particularly relevant here. First, Congress concluded that there is a "substantial governmental and First Amendment interest" in the availability of a diversity of programming. § 2(a)(6), 106 Stat. 1461. Congress found that the interest in diversity is promoted by assuring that cable subscribers have access to local commercial and educational programming. § 2(a)(7)-(9), 106 Stat. 1461, since "[b]roadcast television stations continue to be an important source of local news and public affairs programming." § 2(a)(11), 106 Stat. 1461. Second, Congress concluded that there is "a substantial governmental interest in promoting the continued availability of * * * free television programming," § 2(a)(12), 106 Stat. 1461, but that the evidence it had reviewed showed that "the economic viability of free local broadcast television" may be "seriously jeopardized," § 2(a)(16), 106 Stat. 1462.

In short, when Congress examined the cable industry it found that almost all cable operators had monopolies on the provision of cable services. Furthermore, it found that some of those monopolies had been sanctioned by local governments and that most of the cable operators had been subsidized by broadcasters as a result of federal law. Congress further found that an increasing majority of American households subscribe to cable; that most cable households do not have the capability to receive broadcast stations over the air; that cable operators have not only the capability but also the incentive to discriminate against broadcasters; and that cable operators had dropped a large number of broadcast stations and assigned many others to less desirable channels. Congress decided to take steps to ensure that the availability of broadcast television would not be threatened by further cable penetration and discrimination by cable operators.

3. Congress enacted the 1992 Cable Act over President Bush's veto. See 28 Weekly Comp. Pres. Doc. 1860 (Oct. 3, 1992). Sections 4 and 5 of the Act replace the must-carry rule that had been invalidated in *Quincy Cable* with a more limited set of requirements. Section 4 pertains to local commercial broadcast stations. It provides that a cable system with more than 300 subscribers but 12 or fewer active usable channels must carry "the signals of at least three local commercial television stations." § 4, 106 Stat. 1471; 47 U.S.C. 534(b)(1)(A).[5] For systems with more than 300 subscribers and more than 12 active usable channels, a cable operator must devote

[5] Unless otherwise specified, citations to the United States Code relating to the provisions of the 1992 Cable Act refer to the place in Supp. IV 1992 where those provisions are to be codified.

up to one-third of its channel capacity to local commercial broadcast stations. § 4, 106 Stat. 1471; 47 U.S.C. 534(b)(1)(B).[6] In general, a cable operator must retransmit, in its entirety, the programming of a broadcast station carried to fulfill must-carry obligations. § 4, 106 Stat. 1471-1472; 47 U.S.C. 534(b)(3). And absent an agreement to the contrary, a commercial broadcast station must be carried in its over-the-air position or on certain other specified channels. § 4, 106 Stat. 1472; 47 U.S.C. 534(b)(6). Finally, with some exceptions, a cable operator may not charge a fee for carrying broadcast signals in fulfillment of the must-carry provisions. § 4, 106 Stat. 1473; 47 U.S.C. 534(b)(10).

Section 5 of the 1992 Cable Act imposes similar requirements with respect to local noncommercial educational stations. A cable system with 12 or fewer channels must carry "one qualified local noncommercial educational television station." § 5, 106 Stat. 1478; 47 U.S.C. 535(b)(2)(A). A system having between 13 and 36 channels must carry between one and three such stations, and a system with more than 36 channels must carry "each qualified local noncommercial educational television station requesting carriage." § 5, 106 Stat. 1478; 47 U.S.C. 535(b)(3)(A) and (D). The 1992 Cable Act requires a cable operator, in certain circumstances, to import distant signals (§ 5, 106 Stat. 1478; 47 U.S.C. 535(b)(3)(B)), but provides protection against substantial duplication of local noncommercial educational stations that are carried. § 5, 106 Stat. 1479; 47 U.S.C. 535(e). As with commercial stations, the 1992 Cable

[6] If there are not enough full power local commercial broadcast stations to fill the requirements of the must-carry provisions, a cable operator with up to 35 active channels must carry one qualified low power station and an operator with more than 35 channels must carry two such stations. See § 4, 106 Stat. 1473-1474; 47 U.S.C. 534(c)(1); see also § 4, 106 Stat. 1476-1477; 47 U.S.C. 534(h)(2) (defining "qualified low power station").

Act requires cable operators to carry the entire programming schedule of noncommercial educational stations and specifies channel positioning requirements. See § 5, 106 Stat. 1479-1480; 47 U.S.C. 535(g) and (i).

Thus, the must-carry rules "require cable operators to set aside just over a third of their channels for local broadcast stations." J.S. App. 50a (dissenting opinion). In addition, Section 6(2) of the 1992 Cable Act also provides that commercial broadcast stations may elect not to invoke the uncompensated must-carry requirements and instead may withhold consent to retransmit their programming in the absence of compensation. See 106 Stat. 1482-1483; 47 U.S.C. 325(b)(1) and (3). As the three-judge district court explained, Congress realized that "cable operators will want to carry the signals of larger, viewer-popular broadcasters and will pay for the privilege." J.S. App. 6a. Congress also prohibited the granting of exclusive franchises. § 7(a)(1), 106 Stat. 1483; 47 U.S.C. 541(a)(1).

B. The Proceedings In This Case

1. Soon after the 1992 Cable Act was enacted, the appellants—cable operators and cable programmers—filed these five consolidated actions challenging the constitutionality of the must-carry requirements. Their must-carry claims were heard by a three-judge district court convened under 28 U.S.C. 2284. See 1992 Cable Act, § 23, 106 Stat. 1500; 47 U.S.C. 555(c)(1). A divided court ruled that the must-carry provisions of the 1992 Cable Act comply with First Amendment requirements.

a. The district court concluded that in enacting the must-carry provisions, Congress was seeking merely "to impose order upon a market in dysfunction." J.S. App. 12a. In the court's view, the 1992 Cable Act "is simply industry-specific antitrust and fair trade practice regulatory legislation." *Id.* at 13a. It described the must-carry requirements as "essentially economic regulation designed

to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices." *Ibid.*[7]

The court rejected the appellants' contention that the must-carry obligations are subject to strict scrutiny under this Court's cases condemning compelled speech or interference with editorial discretion. See J.S. App. 16a-19a. Those decisions, the court reasoned, call for strict scrutiny only if "it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken." *Id.* at 16a. Thus, finding that the aim of the must-carry provisions is "to restore competitive balance and assure a functional market in the distribution of video signals, whatever might be said with those signals," the court concluded that the rules do not prescribe the content of speech. *Id.* at 19a.[8]

The court found unpersuasive appellants' contention that the 1992 Cable Act's policy—to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media" (§ 2(b)(1), 106 Stat. 1463)—is indicative of a content-based statute. J.S. App. 19a & n.23. The court acknowledged that "Congress may have presumed, on a

[7] The court paid "respect to the factual findings made by Congress," but gave "no deference to Congress" with respect to "whether the facts present the need for special First Amendment treatment." J.S. App. 22a n.25.

[8] As the court explained, "[a]ll parties agree * * * that the must-carry provisions are not *viewpoint*-based; must-carry rights are conferred upon all full-power local broadcasters, and the obligations upon most cable operators, regardless of any views expressed in the programming of either." J.S. App. 15a-16a. Hence, "[t]he provisions do not compel the carriage of any particular messages nor do they impose any burden on operators or programmers on the basis of the messages they or the broadcasters propose to transmit." *Id.* at 16a. The court added that "the must-carry provisions hardly evince the type of nefarious governmental activity guarded against by the First Amendment generally and the strict scrutiny standard in particular." *Id.* at 20a.

very nonspecific (and unarticulated) level, that there would be some content differences between the subject matter and/or emphasis of the video signals emitted by local broadcasters and those produced by cable programmers." *Id.* at 20a. But the court concluded that "the must-carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages that these embattled cable operators, broadcasters, and programmers have in contemplation to deliver." *Id* at 13a. It added that "if the must-carry provisions are content-related at all, they are only marginally so, to the point of *de minimis*." *Id.* at 20a.

The court then sustained the must-carry provisions under the intermediate scrutiny standard prescribed in *United States* v. *O'Brien*, *supra*, and *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). First, the court concluded that the must-carry provisions further the significant governmental interest of "promot[ing] fair competition among video 'speakers' in order to assure the survival of local broadcasting for the benefit of both those who subscribe to a cable service and for those who do not." J.S. App. 23a; see *id.* at 23a-26a. Second, in ruling that the must-carry provisions are narrowly tailored to serve that interest, the court emphasized Congress's finding that input-selector switches are not an effective means of preserving local broadcasting and that the must-carry requirements do not unnecessarily burden the appellants' freedom of speech. *Id.* at 26a-28a. The court also noted that "the burdensomeness of the must-carry provisions is illusory in the potentially significant number of cases in which a cable operator receives a carriage request from an operator it would have carried even in the absence of the request." *Id.* at 27a n.29.

b. Judge Sporkin filed a concurring opinion to emphasize that "any burden imposed by the 1992 Cable Act on speech is * * * remote and incidental to the purpose and effect of the 1992 Cable Act." J.S. App. 36a. In his view, Congress acted permissibly to rei[n] in cable

companies' growing economic might and to restore competitive balance in the telecommunications industry." *Ibid.* He concluded that "this case is not about protecting free speech and the First Amendment," but instead "is about market domination and control." *Ibid.*

c. Judge Williams dissented. He recognized that Congress confronted the "very real problem" that "cable systems control access 'bottlenecks' to an important communications medium." J.S. App. 50a. At the same time, Judge Williams disagreed with Congress's conclusion that broadcast television was potentially in jeopardy: "So long as local broadcast programs continue to be so popular, it appears that cable simply cannot afford to drop broadcast signals to any significant degree." *Id.* at 66a. He also recognized that "a relatively large number of channels is available (ranging from the teens up to 40, 50 and more)" to cable programmers despite the must-carry rules, and that "the channels are discrete, so that viewers will be less likely to attribute all speech on all channels to the cablecaster." *Id.* at 59a. But he concluded that "the proper test is strict scrutiny" (*id.* at 57a) because "the statute is content-based" in that it "require[s] cablecasters to carry the speech of local broadcast stations" (*id.* at 54a). The flaw Judge Williams perceived in the statute could be remedied, in his view, by expanding the leased access provisions added by the 1984 Cable Act (see 47 U.S.C. 532), coupled with subsidies that would ensure that broadcast stations would be able to lease the additional cable channels that would be set aside. J.S. App. 51a, 61a. Since that approach would constitute a less restrictive alternative, in Judge Williams' view, he would have held the statute as written unconstitutional.

2. The district court denied the appellants' request for an injunction pending appeal. 4/14/93 Order 1-2. The Chief Justice also denied appellants' application to enjoin the enforcement of Sections 4 and 5 during the pendency of this appeal. *Turner Broadcasting System, Inc.* v. *FCC*, 113 S. Ct. 1806 (1993) (Rehnquist, C.J., in chambers).

SUMMARY OF ARGUMENT

A. In our view, the district court, while reaching the correct result, applied too demanding a standard. Rather than the intermediate standard of *United States* v. *O'Brien*, 391 U.S. 367 (1968), or the more exacting standard of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), the court should have applied the less demanding standard of *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). The *Red Lion* standard, which does not require content-neutrality (but does require viewpoint-neutrality), is applicable to cases where Congress acts to correct dysfunction in a market whose commodity is speech, and requires the government to show that reasonable steps were taken to correct that dysfunction.

This is such a case, and the must-carry rules are reasonable. The cable market is clearly a market that is dysfunctional at this time. Less than one percent of cable operators face competition from other cable operators, in part on account of exclusive franchise arrangements previously sanctioned by local governments. At the same time, cable operators serve a majority of households, and broadcasters—cable operators' primary competitors—are effectively shut out of cable households unless they are carried by the cable operator. Moreover, cable operators often have a financial interest in cable programmers and they compete with broadcasters for advertising, thus giving cable operators multiple incentives to discriminate against broadcasters. And, in fact, cable operators have dropped thousands of broadcasters and relegated thousands more to undesirable channels. S. Rep. No. 92, 102d Cong., 1st Sess. 25, 43-44 (1991).

The must-carry obligations enacted by Congress are a reasonable attempt to correct the market dysfunction Congress identified. In arguing to the contrary, the cable operators suggest that there is no real basis for Congress's concern—they claim that they will carry almost all broadcast stations in any event, so that cable viewers will have access to those stations and the availability of free televi-

sion will not be diminished significantly for those who either are not served by cable television, cannot afford to subscribe to cable television, or choose not to subscribe. See, *e.g.*, Time Warner Br. 42. That factual argument is contrary to the argument advanced by the cable programmers, who claim that in the absence of must-carry rules they would replace a significant number of broadcast stations. See, *e.g.*, Turner Broadcasting Br. 17. It is also belied by the record compiled by Congress. In any event, to the extent that the cable operators are right in arguing that Congress overestimated the potential threat to free broadcast television because they would carry most broadcast stations anyway, their argument shows that any harm to First Amendment interests is correspondingly limited.

Thus, although cable television is not affected by the scarcity of the broadcast spectrum, this case is comparable to *Red Lion*, where the Court upheld the FCC's fairness doctrine and its personal attack rule, rules with much more extensive impact on the content of programming and editorial judgment than the must-carry rules. Spectrum scarcity was not the sole basis for the Court's decision in *Red Lion*, as is shown by the Court's reliance on *Associated Press* v. *United States*, 326 U.S. 1 (1945), which upheld an antitrust decree requiring a news gathering operation to provide its services to newspapers that it did not choose to serve. The key similarity is that in all three cases—*Red Lion*, *Associated Press*, and this case—the challenged rules advance First Amendment interests threatened by market dysfunction.

B. Although the *O'Brien* standard is more stringent than the standard that ought to apply, the district court correctly concluded that the must-carry rules pass muster under that standard as well. The must-carry rules are content-neutral under *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989), since the government has not "adopted a regulation of speech because of disagreement with the message it conveys." Congress's purpose of ensuring that cable viewers have access to local broadcasters, if "content-related at all," is "only marginally so, to the point of *de minimis*," as the district court held. J.S. App. 20a. And Congress's goal of ensuring that viewers who do not subscribe to cable have access to a vital broadcast market is not content-related at all.

The must-carry rules are also not "substantially broader than necessary" to achieve Congress's legitimate purposes. *Ward*, 491 U.S. at 800. Sections 4 and 5 of the 1992 Cable Act require cable operators to devote only about one-third of their channels to commercial broadcast stations and a few more channels to educational stations. Thus, the must-carry rules apply to fewer than half of the channels available for cable programming—and the cable operators claim they would carry most of those stations in any event.

C. The must-carry rules are not comparable to the right-to-reply law invalidated in *Tornillo*. That statute exacted a penalty based on the viewpoint expressed by a newspaper, and threatened to chill the speech of newspaper editors, who might choose not to print editorials critical of a candidate if forced to print a reply. Any intrusion by the must-carry rules on whatever editorial discretion is exercised by cable operators plainly is minimal in comparison with the authentic infringement of First Amendment interests caused by the right-to-reply statute. Nor is this case comparable to *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam). Like *Tornillo*, that case involved a restriction on speech at the core of the First Amendment, since the statute at issue directly limited speech intended to persuade others to vote for particular candidates for public office. The must-carry rules, in contrast, merely require cable operators to carry a limited number of broadcast stations. This case is more similar to *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), which upheld a law requiring shopping center owners to allow speech on their property. As in this case, the law at issue did not dictate the content or the subject

matter of any message, and the shopping center owners, like cable operators, may distance themselves from the message conveyed by any particular speaker.

Moreover, the alternative proposed by Judge Williams is not less restrictive than the alternative chosen by Congress. A system under which Congress expanded the leased access channels and subsidized broadcasters to ensure that they used them would be little different in practice from the must-carry rules, except that the taxpayers would have to support broadcasters. Thus, even if strict scrutiny applied, it is not apparent that the must-carry rules would be invalid.

ARGUMENT

THE MUST-CARRY RULES ENACTED BY CONGRESS DO NOT VIOLATE THE FIRST AMENDMENT

This case is not about a governmental effort to regulate speech, but is about Congress's effort to prevent anti-competitive practices by those who exercise monopoly power in the market for the *delivery* of television programming to American homes. As Congress expressly found in passing the 1992 Cable Act, cable television operators exercise undue market power in what has become a dominant medium for the delivery of video signals and thereby are jeopardizing the continued availability of free broadcast services to viewers in many localities. The arguments of the appellants, if accepted, would mean that Congress is powerless to correct the monopolistic practices of cable operators.

A. The Must-Carry Rules Should Be Upheld As Limited, Viewpoint-Neutral Measures That Reasonably Protect Viewers' Interests From The Adverse Effects Of Market Dysfunction

The three-judge district court looked at the question presented as requiring it to decide whether to apply the intermediate standard of *O'Brien* or the stricter standard of *Tornillo*. But while we agree with the district court's analysis of the issue when considered within that framework, we think this case should be analyzed under a different framework—this Court's precedents governing legislative efforts to correct market failure in a market whose commodity is speech. That framework is particularly applicable where, as here, First Amendment interests lie on both sides of the dispute.

1. *Congress may enact reasonable, viewpoint-neutral regulations to regulate a market whose commodity is speech*

The must-carry provisions are valid under a straightforward application of this Court's cases recognizing that when market failure threatens to drown out the speech of some, Congress may take reasonably limited and viewpoint-neutral measures to protect the "paramount" First Amendment interests of viewers (*Red Lion*, 395 U.S. at 390) by ensuring that a diversity of programming and information will be available. The proper framework for evaluating the First Amendment issues in this case is found in *Associated Press* v. *United States*, 326 U.S. 1 (1945). There, this Court rejected a First Amendment challenge to the application of the Sherman Act to a news gathering organization. Although the judgment in *Associated Press* required the organization to deal with certain newspapers that it would otherwise have excluded from its membership, this Court held that the resulting obligation to speak was permissible under the circumstances. The Court said that it would be "strange indeed" if "the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom." *Id.* at 20. It explained:

> The First Amendment * * * rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. * * * Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing

> is not. Freedom of the press from government interference under the First Amendment does not sanction repression of that freedom by private interests.

Ibid.

Similarly, *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951), concerned a newspaper's refusal to accept advertisements from merchants who also advertised on the local radio station. This Court sustained an injunction compelling the newspaper to carry the advertisements. The Court said that this government prohibition of the newspaper's anti-competitive practice imposed "no restriction upon any guaranteed freedom of the press." *Id.* at 155.

Appellants attempt to distinguish *Associated Press* and *Lorain Journal* on the ground that they arose under the Sherman Act, a statute of general applicability. To be sure, that consideration was part of the rationale of both *Associated Press* and *Lorain Journal*. But it was not, and could not have been, the entire rationale of those cases. Neither case involved a facial attack on the application of the antitrust laws to the media. Rather, each case involved an as-applied challenge to a particular decree enforcing the Sherman Act in a way that directly altered the defendant speaker's communicative activity. The judgment in *Associated Press* ordered the news organization to share its collective information (*i.e.*, to speak) with some entities with which it otherwise would not do business, and the injunction in *Lorain Journal* required a newspaper to carry advertisements that it would not otherwise have carried.

Moreover, in attempting to distinguish those cases on the ground that they involved applications of a statute of general applicability, the appellants rely on a distinction that has nothing to do with the extent of any infringement on First Amendment interests. That is, the extent of First Amendment injury does not depend at all on whether an injury is caused by the application of a general statute

or a more specific statute. It might be appropriate, when evaluating the constitutionality of a statute directed to some part of the press, for a court to consider whether such a statute is intended to punish or suppress a speaker. See, *e.g.*, *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). But in this case, there is no suggestion that Congress was up to anything "nefarious." J.S. App. 20a. Accordingly, it should not matter that the minor infringement on First Amendment interests in this case results from a statute directed to the cable industry rather than from a specific decree implementing a general statute. If anything, there should be greater justification for that minor infringement because it results from a statute specifically designed to protect other First Amendment interests that have been jeopardized by the particular monopolistic practices the statute addresses.

Furthermore, in *Teleprompter Corp.* v. *CBS*, 415 U.S. 394, 414 (1974), after noting that the copyright legislation at issue had been enacted before broadcast television or cable television had been conceived, the Court decided that "[d]etailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress." *Ibid.* Thus, the Court envisioned specific legislation directed to the commercial relationship between cable television and broadcast television, and hardly suggested that such legislation would be subjected to more exacting scrutiny than would decrees issued by courts interpreting more general statutes.

The reasoning of *Associated Press*—that First Amendment interests are served when the government takes reasonable steps to correct market failure in a market whose commodity is speech—has been applied to the regulation of radio and television broadcasting, an area closely related to the cable industry. For more than half a century, Congress and the FCC have regulated broadcasting "so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-

wide, and world-wide wire and radio communication service." 47 U.S.C. 151 (1988). To that end, Congress has charged the FCC, *inter alia*, with encouraging "the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g) (1988)) and with awarding broadcast licenses so that the "public convenience, interest, or necessity" will be served and "a fair, efficient, and equitable distribution of radio service" will be provided to all the Nation's communities (47 U.S.C. 307(a) and (b) (1988)).[9]

In numerous cases, this Court has sustained against First Amendment challenge the FCC's reasonably limited and viewpoint-neutral implementation of its authority to correct market failure that interfered with the wide dissemination of programming and information to listeners and viewers. Moreover, this Court has sustained such regulation even when the resulting rules were designed to affect the content of programming carried by broadcasters. See, *e.g.*, *NBC* v. *United States*, 319 U.S. 190, 198-201, 226-227 (1943) (sustaining FCC rules that, *inter alia*, prohibited networks from entering contracts forbidding network affiliates from carrying programs of another network and forbidding a network from selling its programs to another station in the affiliate's territory); *Red Lion*, 395 U.S. at 392-401 (sustaining the FCC's personal attack rule and the fairness doctrine as applied to broadcasters); *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 801 (1978) (FCC may prohibit co-ownership of a newspaper and broadcast station located in a single community; the "purpose and effect [of the regulations] is to promote free speech, not

[9] Newspapers are also subject to special marketplace regulation designed to enhance diversity. The Newspaper Preservation Act, 15 U.S.C. 1801-1804, permits "Joint Operating Agreements" that, by preserving a newspaper operation that otherwise would fail, arguably burden the speech of smaller newspapers that would have benefited from such failure. The constitutionality of the Act has been upheld. *Committee for an Independent P-I* v. *Hearst Corp.*, 704 F.2d 467, 482-483 (9th Cir.), cert. denied, 464 U.S. 892 (1983).

to restrict it"); *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 567 (1990) (sustaining minority preferences in licensing and distress sales; "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective"); see also *CBS* v. *FCC*, 453 U.S. 367, 396 (1981) (upholding a law requiring "reasonable access" to broadcast time for federal electoral candidates, and noting that the statute makes a "significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process"). Thus, the Court has approved regulation that is not entirely "content-neutral" where the regulation advanced the interests of viewers or listeners.

As the Court explained in those cases, the free market does not function properly in the context of broadcasting because the radio spectrum is not large enough to accommodate everyone wishing to broadcast. Consequently, broadcast regulation, including the licensing of broadcasters, has been "as vital to its development as traffic control was to the development of the automobile." *NBC*, 319 U.S. at 213. Congress and the FCC may not use their regulatory authority to favor speakers "upon the basis of their political, economic or social views" (*id.* at 226); to silence, discriminate against, censor, or promote particular viewpoints (*Red Lion*, 395 U.S. at 396); or to adopt requirements that are not "limited" and "reasonable" in scope (*CBS* v. *FCC*, 453 U.S. at 396 (emphasis omitted)). But within those boundaries, this Court has found considerable latitude for federal regulation designed to promote a broad diversity of programming and information. Thus, like *Associated Press* and *Lorain Journal*, *Red Lion* recognizes that such regulation directly serves "the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion*, 395 U.S. at 390.

2. *The cable market is a dysfunctional market that is comparable to the broadcast market*

Although cable companies frequently use the airwaves to transmit their offerings, see *Teleprompter Corp.* v. *CBS*, 415 U.S. 394, 399 n.4 (1974), the cable industry is not characterized by the same kind of physical scarcity as broadcasting. Salient features of that industry nevertheless similarly justify governmental regulation to correct market failure and promote diversity of programming and information.

a. In passing the 1992 Cable Act, Congress relied on numerous factual findings, many of which it incorporated into the text of the statute. Those findings show that although the cable industry is not characterized by the same kind of physical scarcity as broadcasting, it nevertheless is marked by the same sort of market failure that justifies corrective congressional action. Market dysfunction in the cable industry is caused by the monopoly power of cable operators, which the operators can exploit via anti-competitive practices that harm broadcasters and deprive viewers of diverse viewing choices. Market dysfunction also stems from other governmental action in the marketplace that favors cable operators.

First, Congress accurately determined that various circumstances, "including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area," have given rise to bottlenecks controlled by cable operators. 1992 Cable Act, § 2(a)(2), 106 Stat. 1460; see J.S. App. 13a ("[t]he regulation is justified by the existing structure of the cable business itself, and by the market peculiarities resulting from the technological differences in the manner in which different video signal distributors deliver their products to their viewers' receivers"); cf. *FCC* v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2104 (1993) (because of the fixed costs incurred in installing the receiving antenna and the associated transmission equipment, the first cable operator in a market will enjoy substantial cost advantages in providing service to additional, unserved subscribers). As a result of those circumstances, virtually all cable operators enjoy a local monopoly on the provision of cable services.[10]

Congress also found that (1) cable companies serve more than 60% of American households with televisions;[11] (2) the cable industry is highly concentrated;[12] and (3) the industry is vertically integrated and its members have a powerful incentive to favor affiliated cable programmers over unaffiliated broadcasters.[13] § 2(a)(3)-(5), 106

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[10] See, *e.g.*, *Media Ownership Hearings* 685 (statement of Edward O. Fritts, President, National Association of Broadcasters (NAB) (20 multiple system operators (MSOs) serve 70% of subscribers; fewer than 1% face competition).

[11] See *Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 755 (1991) [hereinafter *1991 House Cable Hearings*] (statement of NAB) (93% of American homes are passed by cable, and more than 60% subscribe to cable); *Cable TV Consumer Protection Act of 1991: Hearing on S. 12 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 1st Sess. 118 (1991) [hereinafter *1991 Senate Cable Hearing*] (statement of James P. Mooney, President, National Cable Television Association) (60% of homes have cable).

[12] See, *e.g.*, *Media Ownership Hearings* 343 (statement of Bob Phillips, National Rural Telecommunications Cooperative) (noting that the 25 biggest MSOs serve 72% of the 49.5 million cable subscribers); *id.* at 97 (statement of Michael A. Salinger, Columbia University) (one company owns 82% of second largest MSO and owns first and third largest pay services); *id.* at 85 (statement of Ben H. Bagdikian, University of California at Berkeley) (three cable firms serve one-third of all subscribers). As a result of this concentration, broadcasters typically lack bargaining power comparable to that of cable operators.

[13] See, *e.g.*, *Media Ownership Hearings* 99 (statement of Michael A. Salinger, Columbia University) (describing research showing that "vertically integrated systems give preference to the services they own and tend to exclude competing services"); *1991 Senate Cable Hearing* 214 (statement of James Hedlund, President, Association of Independent Television Stations, Inc. (AITS)) (same);

Stat. 1460-1461. In addition, cable companies compete with broadcasters for advertising revenues,[14] giving the cable operators a strong economic incentive to drop the broadcasters' signals or reposition them unfavorably.[15] § 2(a)(14)-(15), 106 Stat. 1462. Finally, the concerns relating to that potential unfair competition cannot be addressed effectively through technology allowing subscribers to switch between cable transmissions and over-the-air broadcasting; Congress found that most cable subscribers do not or cannot receive broadcast television other than through their cable company.[16] Accordingly, Congress found that, in the absence of a must-carry requirement, the incentive for cable operators to engage in anti-competitive behavior will seriously jeopardize the economic viability of local broadcasters and their ability to

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see also *Media Ownership Hearings* 29, 31-32, 41 (statement of John C. Malone, President, Telecommunications, Inc.) (describing holdings of cable companies in cable programmers).

[14] See, *e.g.*, *Cable Television Regulation (Part 2): Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 103 (1990) (statement of NAB) (advertising on cable rose from $58 million in 1980 to approximately $2 billion in 1989); *1991 Senate Cable Hearing* 351-352 (statement of Association of National Advertisers, Inc.) (must-carry requirements "are essential to ensure that cable systems do not misuse their 'gate-keeper' position to exclude or financially penalize broadcast competitors"); *1991 House Cable Hearings* 755 (statement of NAB) (cable sold $963 million in advertising in 1987; in 1991 estimated cable advertising revenues were between $2 and $3 billion; and revenues are estimated to reach $9 or $10 billion by the end of the decade).

[15] See, *e.g.*, *1991 Senate Cable Hearing* 214-215 (statement of James Hedlund, President, AITS) (discussing incentive of cable companies to drop broadcasters and reduce competition for viewers and advertising revenues).

[16] See, *e.g.*, *1991 Senate Cable Hearing* 246 n.86 (statement of James Hedlund, President, AITS) ("both the broadcasting and cable industries agreed that the A/B switch was not a viable solution to the problem" of cable access).

originate quality local programming. § 2(a)(16)-(17), 106 Stat. 1462. The must-carry requirements therefore directly address economic market dysfunction by ensuring that cable operators do not use their market power to engage in unfair competition to the detriment of viewers who depend upon or wish to receive full-service local broadcasting.

Congress's findings concerning the effect on broadcasters of anti-competitive behavior by cable operators are hardly surprising, since this Court's cable television precedents have recognized that cable and broadcast television are integrally related, and that the objectives of broadcast regulation adopted by Congress and the FCC and approved by this Court could not be accomplished if the cable industry may not be regulated to advance the purposes of such regulation. Prior to 1984, the Commission lacked explicit authority to regulate cable. But it adopted cable regulations—including a must-carry rule—pursuant to its authority under the Communications Act of 1934, 47 U.S.C. 151 *et seq.* See *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 697, 741-742 (1965); see also 47 U.S.C. 151, 303(b) and (g) (1988).[17]

In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), this Court sustained the FCC's exercise of authority over cable—including its authority to promul-

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[17] The D.C. Circuit decisions invalidating the FCC's must-carry rules (*Quincy Cable* and *Century Communications*) do not speak to the validity of the must-carry provisions of the 1992 Cable Act. In each case, the court of appeals relied heavily on the absence of a sufficient record to support the FCC's conclusion that an unregulated cable industry posed a serious threat to local broadcasting. See *Century Communications*, 835 F.2d at 304; *Quincy Cable*, 768 F.2d at 1455-1459. Because the must-carry provisions enacted in the 1992 Cable Act are supported by an extensive legislative record, reduced to congressional findings of fact, the reasoning of *Quincy Cable* and *Century Communications* would suggest a contrary result here.

gate must-carry rules. In so doing, the Court emphasized that "Congress has imposed upon the Commission the 'obligation of providing a widely dispersed radio and television service,' with a 'fair, efficient, and equitable distribution' of service among the 'several States and communities.' " 392 U.S. at 173-174 (footnote omitted). The Court also noted that Congress and the FCC had concluded that "these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.' " *Id.* at 174. Relying on the Commission's reasonable determination that the importation of distant signals by cable operators threatened to divide the "available audiences and revenues" and to "deprive the public of the various benefits of a system of local broadcasting stations," the Court found that the FCC could not discharge its responsibilities regarding broadcasting without also asserting authority over cable. *Id.* at 174-176; see also *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) (upholding FCC regulation requiring cable systems with 3,500 or more subscribers to originate local programs to assure diversified programming).[18]

Congress's findings accompanying the 1992 Cable Act indicate that the must-carry provisions rest on the same rationale as the cable regulations upheld against statutory challenge in *Southwestern Cable* and *United States* v. *Midwest Video Corp.* As Congress specifically found,

[18] See, *e.g.*, *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 697 (1979) (" 'successful performance' of [the FCC's] duty to ensure 'the orderly development of an appropriate system of local television broadcasting' depended on regulation of cable operations"); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984) ("[t]here can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest").

enactment of the must-carry requirements was necessary not only to preserve "the economic viability of free local broadcast television," but also to ensure that broadcasters retain their "ability to originate quality local programming." § 2(a)(16), 106 Stat. 1462. Even where market dysfunction in the cable industry does not jeopardize the existence of local broadcasting altogether, it nevertheless threatens to weaken the local broadcasters' ability to provide full-service programming to local communities. See H.R. Rep. No. 628, *supra*, at 51-52, 64; S. Rep. No. 92, *supra*, at 59. At the same time, broadcasters' programming "remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of [broadcasters'] signals." § 2(a)(19), 106 Stat. 1462. Accordingly, as the Court recognized in *Southwestern Cable* and *United States* v. *Midwest Video Corp.*, because of the similarity and interrelatedness of cable and broadcast television, a comparable regulatory approach is appropriate for each. *United States* v. *Midwest Video Corp.*, 406 U.S. at 669 (plurality opinion) (cable regulation seeking to assure that "viewers are provided suitably diversified programming" has "the same objective underlying [the broadcast] regulations sustained in *National Broadcasting Co.* v. *United States, supra*").

Second, governmental conduct has substantially contributed to the market power of cable. Cable systems traditionally have used public rights-of-way (see *Leathers* v. *Medlock*, 111 S. Ct. 1438, 1441 n.1 (1991); *Beach Communications*, 113 S. Ct. at 2100), and that use justifies the imposition of licensing requirements by local authorities. Moreover, the federal government has required cable systems to obtain state or local franchises. See 47 U.S.C. 541(b) (1988). Until the 1992 Cable Act prohibited franchise authorities from doing so (§ 7(a)(1), 106 Stat. 1483; 47 U.S.C. 541(a)(1)), most local authorities made exclusive franchises available to cable operators. See

J. Goodale, *All About Cable* § 4.02[1], at 4-7, to 4-8 (1991) (discussing prevalance of exclusive cable franchises); 47 U.S.C. 541(a)(1) (1988) (authorizing franchise authorities to determine the number of cable operators in its jurisdiction).

In addition, in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, Congress sharply limited franchise fees (47 U.S.C. 542 (1988)); restricted rate regulation (47 U.S.C. 543 (1988)); and substantially limited franchise authorities' ability not to renew franchises, while also requiring compensation when franchises were not renewed (47 U.S.C. 546 and 547 (1988)).[19] Finally, Congress provided substantial benefits to cable operators by enacting the Copyright Act of 1976, 17 U.S.C. 111, which adopted a system of compulsory licensing for the retransmission of broadcast programming by cable operators.[20]

As this Court has made clear, where government regulation has given certain speakers "a preferred position" in the marketplace of ideas and enables them to monopolize an important means of communication, the government may act to ensure that such speakers provide a diversity of programming to their listeners and viewers. See *Red Lion*, 395 U.S. at 400; cf. *Austin* v. *Michigan*

[19] The 1992 Cable Act imposes significant rate regulation on cable operators that are not subject to effective competition. § 3(a), 106 Stat. 1464-1471; 47 U.S.C. 543.

[20] Time Warner argues (Br. 37 n.36) that cable operators were better off prior to the enactment of Section 111, because this Court held in *Teleprompter Corp.*, 415 U.S. at 414, that "copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived," did not require them to pay royalties. But the scope of copyright protection in broadcast signals is plainly a matter for Congress to decide, and cable operators had no right to expect that the rule under which broadcasters had no control over their signals would continue. By allowing cable operators to retransmit signals in the absence of an agreement, Section 111 benefited cable operators.

State Chamber of Commerce, 494 U.S. 652, 659-660 (1990) (because "state-conferred corporate structure * * * facilitates the amassing of large treasuries," the State has a compelling interest in ensuring that corporations do not use the resources to obtain an "unfair advantage in the political marketplace"). Even where changed circumstances create a "present possibility for new entry by competing" entities, that possibility is "not enough, in itself, to render unconstitutional the Government's effort" to assure a wide availability of programming and information in the public interest. *Red Lion*, 395 U.S. at 400.

b. The appellants attack the factual findings of Congress in various ways that are to some degree contradictory. The cable operators, who complain that they are forced to carry broadcast stations they otherwise would drop, simultaneously emphasize their claim that the record does not support Congress's conclusion that broadcast television is in jeopardy. Time Warner, for example, notes (Br. 42) that a 1988 study on which Congress relied suggested that 80% of cable operators did not drop any broadcast stations during the period in which no must-carry rules applied, and argues from that evidence that there is no basis for Congress's conclusion that cable operators might exploit their control over broadcasters' access to cable viewers. The cable programmers, on the other hand, claim that "[n]ewer cable program services, such as The Sci-Fi Channel, The Cartoon Network, and The Learning Channel, are finding it especially difficult to obtain access to audiences because of the must-carry provisions." Turner Broadcasting Br. 17. The programmers contend, in effect, that in the absence of must-carry rules cable operators would drop numerous broadcast stations and carry their programming instead.

Both the cable programmers and the cable operators cannot be right about the effect of the must-carry rules. If the programmers are right, then broadcast stations would be in serious jeopardy in the absence of must-carry

rules, as Congress concluded. That is, if, in fact, networks such as The Sci-Fi Channel, The Cartoon Network, and The Learning Channel would have access to significantly more cable viewers in the absence of must-carry rules, then a significant number of broadcast stations would be dropped to make room for them. If a broadcast station is available only over-the-air, and hence practically unavailable to the increasing majority of households that subscribe to cable television, then that broadcast station may be in danger, since the audience available to it will be reduced by more than half. If the operators are right, on the other hand, then any First Amendment injury is minimal. That is, if, in fact, 98% of the broadcast stations that are entitled to be carried under Sections 4 and 5 of the 1992 Cable Act would be carried in any event, as Time Warner states (Br. 42 n.46), then (a) the programmers would have no significantly greater access to cable systems in the absence of must-carry rules and (b) the burden imposed on cable operators by the must-carry rules is insubstantial, since they would carry almost all of the broadcast stations anyway. Hence, if Congress's concerns about the unfair use of market power by cable operators are overstated, as the cable operators contend, then the appellants' claims of First Amendment injury are correspondingly overstated.

In our view, the district court properly declined to substitute the appellants' various judgments concerning the need for must-carry rules for that of Congress. This Court has admonished that it "must afford great weight to the decisions of Congress and the experience of the Commission." *CBS* v. *Democratic National Comm.*, 412 U.S. 94, 102 (1973). It is particularly appropriate to respect the predictive judgment of Congress and the FCC when they address the relationship between two technical, rapidly changing, and closely interdependent industries—broadcasting and cable. Indeed, even in cases in which heightened scrutiny was applied, this Court has

emphasized that it must "pay close attention to the expertise of the Commision and the factfinding of Congress," because "[t]he special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue." *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 569, 572 (1990) (internal quotation marks omitted). While Congress cannot "predict with certainty the consequences of unregulated [cable]," its responsibilities to viewers "demand that it 'plan in advance of foreseeable events, instead of waiting to react to them.'" *Southwestern Cable*, 392 U.S. at 176-177, quoting *First Report & Order*, 38 F.C.C. at 701. The district court in this case properly respected Congress's reasonable predictive judgment, which rested on substantial evidence that cable operators have, and will use, substantial market power to the detriment of local broadcasters and of the paramount First Amendment interests of their viewers.[21]

Accordingly, it is appropriate for this Court to pay deference to Congress's conclusions that cable subscribers

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[21] We are not asking this Court to "defer to Congress' conclusion about an issue of constitutional law." *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 129 (1989). Nor are we asking this Court to defer to "conclusory statements." *Ibid.* In this case, no one disputes Congress's estimates that "approximately 1,700 cable systems have denied carriage of local television stations in approximately 3,600 instances" and that "974 of the cable systems responding" to an FCC survey "admitted that they had shifted positions of one or more local stations in almost 3,000 instances"—which suggests, by projection, that nearly 6,000 broadcast stations had been moved to unfavorable channel locations, since only about half of the country's cable systems responded to the survey. S. Rep. No. 92, *supra*, at 43, 44. The parties disagree primarily about the likely pace of such discrimination as cable penetration advances beyond 60% of television households. As the district court concluded, Congress's findings with respect to such matters are entitled to a "level of deference befitting a co-equal branch of government that is well-equipped to take evidence and make findings." J.S. App. 23a.

might lose access to commercial and educational broadcast television and that "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized" without must-carry rules. 1992 Cable Act, § 2(a)(16), (17), 106 Stat. 1462.[22] As the district court concluded, Congress's predictive judgments are supported by the legislative record. Indeed, Congress's predictions are corroborated by the appellant cable programmers' claims in this case that but for the must-carry rules many cable operators would, for example, drop an educational broadcast station and replace it with The Cartoon Network.

3. *Dysfunction in the cable market justifies the must-carry rules*

Under the applicable standards, Sections 4 and 5 of the 1992 Cable Act easily pass muster. As discussed, the must-carry provisions require cable operators to set aside only a limited portion of their channel capacity for local broadcasting. Moreover, "must-carry rights are conferred upon all full-power local broadcasters, and the obligations upon most cable operators, regardless of any views expressed in the programming of either." J.S. App. 15a-16a. Particularly when measured against broadcast regulations

[22] In evaluating Congress's conclusion that broadcast television would be jeopardized in the absence of must-carry rules, it is not appropriate to ask, as some of the appellants seem to think, whether the evidence shows that broadcast television is likely to be totally eliminated. Rather, the question is whether the broadcast services available to viewers who do not subscribe to cable television are likely to be reduced to a significant extent, because of either loss of some stations altogether or curtailment of service by others. In that respect, this case is the converse of *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2707 (1993), in which this Court upheld a ban on lottery advertising and noted that "the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated."

sustained by this Court—including the explicitly content-related fairness doctrine (*Red Lion*)[23] and right of reasonable access for federal political candidates (*CBS* v. *FCC*)[24] —the reasonably limited and viewpoint-neutral must-carry provisions of the 1992 Cable Act plainly constitute a permissible effort to promote the viewers' paramount First Amendment interest in a wide diversity of programming and information. Indeed, they are far more limited than the must-carry rules this Court found reasonably ancillary to the legitimate objectives of broadcast regulation in *Southwestern Cable*. See 392 U.S. at 166 (under the must-carry rules then in effect, cable systems were required "to transmit to their subscribers the signals of any station into whose service area they * * * brought competing signals" and were forbidden "to duplicate the programming of such local stations for * * * 15 days before and after a local broadcast").

[23] The "fairness doctrine" required broadcasters "to provide adequate coverage of public issues and to ensure that this coverage fairly and accurately reflects the opposing views." *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984). The fairness doctrine also spawned the "personal attack rule," under which broadcasters had to provide reply time to anyone criticized over-the-air. See *Red Lion*, 395 U.S. at 370. The FCC has since eliminated the fairness doctrine (see *Syracuse Peace Council* v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990)), which intruded far more upon programming discretion than a requirement that cable operators devote a limited portion of their channel capacity to local broadcasting, without regard to the programming of the broadcasters to be carried or that which the cable operator would otherwise place on the channels set aside.

[24] The statute upheld in *CBS* authorized the FCC to revoke the license of any station "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 453 U.S. at 374, quoting 47 U.S.C. 312(a)(7) (1988).

Appellants contend that because the cable industry is not characterized by spectrum scarcity, cable regulation cannot be evaluated under standards comparable to those governing broadcasting regulation. For two reasons, that contention is unpersuasive. First, as is the case with broadcasting, part of the bottleneck in the cable industry is attributable to the physical characteristics of cable itself. Although cable is not characterized by spectrum scarcity, it "involves another type of interference—interference with other users of telephone poles and underground ducts." *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982). Cable operators typically (although not invariably) transmit their signals "through cables strung over utility poles and through underground conduits." *Leathers*, 111 S. Ct. at 1441 n.1; see *Beach Communications*, 113 S. Ct. at 2100 (a traditional cable system "delivers video programming to a large community of subscribers through coaxial cables laid under city streets or along utility lines"). The practical difficulty and expense of constructing a competing cable system can therefore be very great, particularly in urban areas. See, *e.g.*, J. Goodale, *supra*, § 4.02[1], at 4-7; Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 332. Thus, there is typically some physical constraint on the development of multiple competing cable systems, and a concomitant need for the government to exert a form of "traffic control" where traditional cable systems are concerned. *NBC*, 319 U.S. at 213.

Second, the concept of physical scarcity is not essential to invoke the framework applicable here. To be sure, the concept of spectrum scarcity played a significant role in the development of this Court's rationale for sustaining broadcast regulation. But the critical factor has not been the physical phenomenon of spectrum scarcity as such, but the resulting inability of the broadcasting market to function successfully. We see no reason to exclude from

the Court's approach cases in which comparable market dysfunction occurs for other reasons. To limit the Court's approach to the physical spectrum, moreover, would be contrary to this Court's precedents.

For example, in articulating the First Amendment justification for the broadcast regulation at issue in *Red Lion*, the Court relied heavily on its precedents in *Associated Press* as well as other newspaper cases having to do not at all with the scarcity of the electromagnetic spectrum, but with economically driven market failure. See *Red Lion*, 395 U.S. at 387, 390. The Court in *Red Lion* also made clear that its analysis applied even where factors other than spectrum scarcity gave some broadcasters the ability to monopolize the market for programming and information:

> Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

Red Lion, 395 U.S. at 400.

In short, the power of private entities to silence others' speech justifies government intervention to promote a diversity of programming and information, whether that market power derives from physical limitations on the

medium of delivery (as in *Red Lion*); from economic monopoly (as in *Associated Press*); from advantages secured through government (as in *Red Lion* and *Austin*); or from a combination of the three (as in this case). Where Congress acts to address such market failure in a reasonably limited and viewpoint-neutral way designed to provide viewers the widest dissemination of programming and information, this Court's cases instruct that First Amendment interests are served, not offended, by such legislation.

The appellants contend that we have read *Red Lion* and *Associated Press* too broadly, and offer a host of hypotheticals, primarily involving newspapers, designed to show that there is some dysfunction in other communications markets but that solutions that are allegedly comparable to the must-carry rules plainly would be unacceptable in those other markets. None of appellants' hypotheticals is comparable to the problem addressed by Congress through Sections 4 and 5 of the 1992 Cable Act. A newspaper is not comparable to a cable operator merely because it is the only daily newspaper in the area. A newspaper would be comparable to a cable operator only if, by subscribing to a newspaper, a person was practically unable to obtain written information from any other source unless the newspaper chose to deliver it. In addition, the cases would be comparable only if the newspaper had both the ability and an economic incentive, on account of competition for advertising, to eliminate other sources of written information. Thus, appellants' hypotheticals are inapposite because newspapers do not have control over access to other sources of written information, while cable operators have control over most viewers' access to their chief competitors, free local broadcasters. Indeed, in *Lorain Journal*—where a newspaper had both sufficient market power and an economic incentive to attack a rival by refusing to carry certain advertisements—this Court held that the newspaper could be required to carry the advertisements.

B. The Must-Carry Rules Also May Be Upheld As Content-Neutral Provisions That Are Narrowly Tailored To Further Substantial Government Interests

Although the district court recognized that Congress sought "to impose order upon a market in dysfunction" (J.S. App. 12a), the district court did not uphold the must-carry rules on the basis of this Court's decisions, such as *Associated Press* and *Red Lion*, approving measures taken to correct market failure that threatens to impair the speech of some. Rather than relying on those cases, the district court upheld the must-carry rules under the more general framework applied by this Court in cases that do not involve market failure that endangers some speakers. The standard applied in *Associated Press* and *Red Lion* is not as stringent as this Court's general standard—as is appropriate since the provisions at issue in those cases (and this case), while burdening speech to some extent, also promote speech. In particular, the general standard is more stringent in that it requires the government to show that the provision at issue is content-neutral (or that it survives strict scrutiny because it is the least restrictive means of satisfying an important governmental objective). Although the district court tested the must-carry rules under a more exacting standard than is appropriate, it correctly concluded that the must-carry rules satisfy that standard as well.

1. The must-carry rules are content-neutral

Although the must-carry provisions, like any law designed to promote diversity of information, may alter the content of programming to some extent, they are content-neutral in the crucial constitutional sense. "The principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). However, "the First Amendment's hostility to content-based regulation extends not only to a restriction on a

particular viewpoint, but also to a prohibition of public discussion of an entire topic." *Burson* v. *Freeman*, 112 S. Ct. 1846, 1850 (1992).

When measured against the standards articulated by this Court, the must-carry provisions are not content-related for First Amendment purposes. As the district court explained, the must-carry provisions "do not compel the carriage of any particular messages nor do they impose any burden on operators or programmers on the basis of the messages they or the broadcasters propose to transmit." J.S. App. 16a. The provisions thus are not designed to express disagreement with the message of cable operators or programmers. Nor do the must-carry provisions single out any topic that cable operators may or may not discuss. Compare, *e.g.*, *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991) (speech about crime); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 537 (1980) (prohibition against discussion of nuclear power).

The district court recognized that one of Congress's purposes in enacting the must-carry provisions was to ensure that cable subscribers would have access to local broadcast television. But as it stated, "Congress' solicitousness for local broadcasters' material simply rests on its assumption that they have as much to say of interest or value as the cable programmers who service a given geographic market audience, not on any recognition that there is a discrete 'local' subject-matter." J.S. App. 20a. That view is supported by the fact that the 1992 Cable Act confers must-carry rights upon all full power local broadcasters regardless of the programming they carry. Thus, "if the must-carry provisions are content-related at all, they are only marginally so, to the point of *de minimis*." *Ibid.*[25]

[25] Section 5 of the Act might be characterized as favoring educational speech over entertainment. However, to the extent that such a characterization is accurate, Section 5 favors all sorts of educational speech, regardless of content.

Moreover, Congress's goal of preserving access to broadcast television for those who are not served by cable or who do not want to subscribe to cable is entirely content-neutral. That is, that goal has nothing at all to do with the content of local broadcasting, but is premised on Congress's desire to ensure the continued availability of "free television programming, especially for viewers who are unable to afford other means of receiving programming." § 2(a)(12), 106 Stat. 1461.

2. *The must-carry rules are narrowly tailored to accomplish significant government interests*

The must-carry rules satisfy both parts of the intermediate scrutiny standard established in *United States* v. *O'Brien*, 391 U.S. 367 (1968), which generally applies to content-neutral speech restrictions. First, there is an "important or substantial governmental interest" (391 U.S. at 377) in addressing unfair competition in the video communications market and in preserving the local broadcast industry. As Congress found in the 1992 Cable Act, the local broadcast industry provides "educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens," and serves as an "important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." § 2(a)(8)(A) and (11), 106 Stat. 1461; see H.R. Rep. No. 628, *supra*, at 50; see also *CBS* v. *FCC*, 453 U.S. at 396 (citing cases). It is particularly important to maintain a vital broadcast market for viewers who are not served by cable or cannot afford cable service. At the same time, broadcast television would be less attractive to advertisers if the primary viewers of broadcast television were families that cannot afford cable, which would tend

to send broadcasters into a downward spiral.[26] As discussed, moreover, if Congress lacked authority to regulate cable television it would effectively lose its ability to assure "a fair, efficient, and equitable distribution" (47 U.S.C. 307(b) (1988)) of broadcasting services, a feature of broadcast regulation for more than half a century. See S. Rep. No. 92, *supra*, at 58. Accordingly, "an important and substantial federal interest" is served by a regulatory scheme that, like the must-carry provisions, "strike[s] a balance between protecting noncable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers." *Capital Cities Cable*, 467 U.S. at 714.[27]

Second, the must-carry requirements are narrowly tailored, as required by *O'Brien*, 391 U.S. at 377, because they are not "substantially broader than necessary" to achieve legitimate governmental ends. *Ward*, 491 U.S.

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[26] In addition, cable technology is the only economically viable method for broadcasters to improve the quality of their picture, as is particularly important in rural areas. See J.S. App. 37a n.2 (concurring opinion) (recounting cable's origination in Mahanoy City, Pennsylvania).

[27] The appellants, by and large, do not contend that there is no substantial government interest in preserving local broadcasting, but instead argue that the evidence presented to Congress does not support Congress's conclusion that free television is in jeopardy. See, *e.g.*, Discovery Communications Br. 38. As we have stated, however, the record before Congress was more than adequate for it to conclude that cable operators have both the ability and the incentive to discriminate against broadcasters. The record also showed that cable operators had dropped more than 3,600 broadcast stations and had moved a larger number of broadcast stations to undesirable channels. Moreover, as we have also stated, to the extent that Congress's fears were inflated, so is any claim of impact on First Amendment interests. See pp. 29-32, *supra*.

at 800. As Congress found after lengthy hearings on the cable industry, the deployment of technology to allow viewers to switch between cable and over-the-air television is not a viable alternative. 1992 Cable Act, § 2(a)(17), 106 Stat. 1462; see *1991 Senate Cable Hearing* 246 n.86. And as noted in the legislative history, the must-carry obligations themselves are carefully confined: a cable operator is required to devote only one-third of its channel capacity to local commercial programming; an operator has discretion to choose which broadcasters it will carry when there are more local broadcasters than the operator must carry; and there is nonduplication protection. S. Rep. No. 92, *supra*, at 61. In short, cable operators have considerable control over which stations will be carried.

In addition, the must-carry rules, by themselves, do not bar any cable network from being carried by any cable operator. Even if a typical 40-station cable operator devotes 40% of its channels to local commercial and educational broadcasters pursuant to the must-carry rules, 24 channels remain for use by cable networks. Accordingly, if a particular cable network cannot gain access to a "full" cable operator, that seems to be due more to that network's failure to displace other cable networks than to its failure to displace local broadcast stations being carried pursuant to Sections 4 and 5. Moreover, the programmer also may gain access to cable viewers by persuading a broadcast station to carry its programming.[28]

Moreover, the effect of the must-carry rules on programmers should be evaluated in light of all of the steps Congress took in the 1992 Cable Act, and two of the

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[28] At the same time, Sections 4 and 5 do not force cable operators to carry broadcast stations that lack audiences. If a commercial station lacks an audience, it eventually will fail, whether or not it is available to cable as well as non-cable households. An educational network is also unlikely to find continued financial support in the absence of an audience, whatever its availability.

provisions Congress enacted at that time are of particular assistance to cable programmers. First, through Section 12 of the Act, 106 Stat. 1488, 47 U.S.C. 536, Congress added a provision that prohibits cable operators from discriminating against nonaffiliated programmers. Second, through Section 9(b), 106 Stat. 1484-1485, Congress amended 47 U.S.C. 532(c) to allow the FCC to determine the rates that may be charged for leased access. Thus, while some cable channels are reserved for broadcasters under Sections 4 and 5, cable programmers may compete on a more level playing field for other channels under Section 12 and, if necessary, may lease a channel pursuant to Section 9(b) and pay only a reasonable rate as determined by the FCC, rather than a rate determined by the cable operator.

C. The Must-Carry Rules Are Not Invalid Under *Tornillo* Or Other "Compelled Speech" Cases

In arguing that the must-carry rules should be scrutinized strictly, the cable operators rely heavily on this Court's decision in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). There, the Court invalidated a state law giving political candidates a right to equal space in a newspaper to reply to attacks on their records by the newspaper. For several reasons, *Tornillo* does not govern here. First, as discussed, for purposes of First Amendment analysis, cable shares many similarities with broadcast television, and the constitutional analysis of *Red Lion* rather than *Tornillo* supplies the relevant framework here. Second, the state statute at issue in *Tornillo* represented a very serious incursion into the editorial discretion of newspapers. The reply statute was strongly viewpoint-based and struck at the core of First Amendment speech —political discourse. When a newspaper expressed a critical opinion of a political candidate, it was compelled by state law to print the opposite viewpoint as well. As the Court explained, the statute "exact[ed] a penalty on the

basis of the content of a newspaper." 418 U.S. at 256. For that reason, editors might self-censor in order to avoid the reply duty imposed by the statute. *Id.* at 257. No such concerns are present in this case. The must-carry provisions are not triggered by any particular programming carried by the cable operator, and therefore serve First Amendment interests without any intent to punish, suppress, or promote the message being conveyed by the broadcaster, the cable operator, or the cable programmer.[29]

Third, although cable operators exercise some "editorial discretion over which stations or programs" to carry (*City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)), they primarily serve as passive conduits retransmitting the programming of others, rather than originating programming of their own. Cf. *Teleprompter Corp.*, 415 U.S. at 404-405.[30] Thus, viewers are far less likely to attribute views expressed on one of the dozens of cable channels to the cable operator than readers are likely to attribute views printed on an editorial page to the editor of a newspaper. If national news-

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[29] Appellants emphasize *Tornillo*'s statement that the government may not compel publishers to print that which " 'reason' tells them should not be published." 418 U.S. at 254 (quoting *Associated Press*, 326 U.S. at 20 n.18). *Tornillo*'s observation, however, does not undermine the constitutionality of the must-carry rules. Where a law is specifically designed to require a publisher to print a rebuttal to a view it has taken, the very essence of the law is to compel that publisher to print what reason tells him not to print. The must-carry rules have no such purpose, but are designed to assure that cable operators do not exercise their market power to silence other speakers and thereby to deprive viewers of competing services.

[30] Moreover, while "[n]ewspapers usually have an editorial policy[,] [c]able operators may not see themselves as editors at all." Barron, *On Understanding the First Amendment Status of Cable: Some Obstacles in the Way*, 57 Geo. Wash. L. Rev. 1495, 1504 (1989).

papers monopolized the local distribution systems in a city (*i.e.*, owned all the newsstands and newsracks), and the city passed an ordinance requiring such newspapers to make a limited percentage of space on their newsstands available to local newspapers (without regard to content), the effect on the newspapers' "editorial discretion" would be far less intrusive than that of a law requiring them to print replies to their editorials. And it would be analogous to the intrusion on cable operators resulting from the must-carry provisions. The concerns underlying *Tornillo* thus do not apply to the must-carry provisions at issue here.

Nor are the appellants assisted by the other "compelled-speech" cases on which they rely. The must-carry provisions can hardly be equated with the viewpoint-based requirement in *Pacific Gas & Elec. Co.* v. *Public Utilities Comm'n*, 475 U.S. 1, 13 (1986) (plurality opinion), that a utility include in its mailings materials submitted by those who disagree with the views expressed in the utility's own newsletter. The utility's mailings did not prevent others from using the mails to reach consumers, but consumers whose television is connected to a cable system find it difficult to receive broadcast signals over the air, thus giving cable operators undue market power that Congress may correct. Nor are appellants correct in contending that Congress's reasonable accommodation of the First Amendment interests of viewers, broadcasters, and cable operators is inconsistent with the principle that a charity cannot be required to disclose facts that might interfere with its ability to obtain political donations, when the disclosure is unnecessary to protect the potential donor's interests. See *Riley* v. *National Fed'n of Blind, Inc.*, 487 U.S. 781, 795-800 (1988).

Appellants also err in relying on *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam). In *Buckley*, the Court struck down statutory limitations on political expenditures, noting that the right of some to speak may not be

secured by suppresing the rights of others. Unlike this case, however, *Buckley* involved no danger that unfair economic competition would deprive viewers of local broadcast services. Moreover, the Court in *Buckley* explicitly distinguished the "fairness doctrine" sustained in *Red Lion*. In so doing, the Court reasoned (1) that restrictions on the broadcast media present different concerns from restrictions on individual speakers and (2) that "the presumed effect of the fairness doctrine is one of 'enhancing the volume and quality of coverage' of public issues." *Buckley*, 424 U.S. at 50 n.55 (per curiam). For the reasons discussed above, those considerations confirm that the must-carry provisions of the 1992 Cable Act are consistent with First Amendment principles. Moreover, the restriction at issue in *Buckley* directly limited speech at the core of the First Amendment—speech designed to influence others to vote for a particular candidate. In this case, in contrast, the limitation at issue merely restricts, to a limited extent, the channels available to a wide variety of cable networks, such as The Cartoon Network and The Sci-Fi Channel, while preserving cable access for local commercial and educational broadcast stations.

This case is more closely analogous to *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 87-88 (1980), which upheld a state law mandating public access to shopping centers for speech-related activities. First, the views expressed by broadcasters are not likely to be associated with the cable company that carries broadcasting stations among many other channels. Second, the government is not dictating that a cable operator convey any particular message. Third, a cable company may insert appropriate disclaimers of responsibility for material broadcast pursuant to the must-carry requirements. Thus, there is no risk that viewers will believe that cable operators are "affirm[ing] their belief" in a position or view carried pursuant to the must-carry provisions of the 1992 Cable Act. *PruneYard*, 447 U.S. at 88.

Judge Williams suggested that while "Congress confronted a very real problem," it also had "an easy remedy entirely consistent with the First Amendment"—expanding the leased access provision, 47 U.S.C. 532, and subsidizing broadcasters to ensure that they may obtain carriage through the leased access provision. J.S. App. 50a, 51a, 61a. Neither group of appellants has embraced that alternative, presumably since it is at least as objectionable, from their points of view, as the must-carry rules. That is, an expanded leased access provision would intrude on whatever editorial discretion cable operators exercise just as much as the must-carry rules. And the cable programmers would not be better off if Congress subsidized broadcasters to ensure that they could purchase leased access. Moreover, from the public's perspective, adoption of Judge Williams' alternative would have serious drawbacks. It is very difficult to refine a subsidy program so that only parties who need subsidization obtain it, and so that they obtain subsidization only to the extent needed. In this context, that would mean limiting the subsidies to those broadcast stations that would otherwise be dropped, and limiting the amount of the subsidies to the amount needed to ensure that, together with the station's resources, the station could obtain carriage under the leased access provisions. Plainly, that would not be simple. There is a good chance that the public would end up subsidizing some broadcast stations that would be carried in any event and subsidizing other stations to a greater extent than necessary. In short, Judge Williams' alternative has little to offer.[31]

At the same time, Judge Williams' alternative is entirely consistent with our view that Congress may re-

[31] Judge Williams' hypotheticals are also inapt. The hypothetical in which local residents, but only local residents, are allowed to leaflet in a shopping center (J.S. App. 52a-53a) is quite unlike the must-carry rules, which provide that only a limited portion of a cable operator's channel capacity must be devoted to carrying broadcast stations. The hypothetical involving the "paper-springer" (*id.* at 52a) is also quite unlike this case. Once again, the must-carry rules do not limit cable access to broadcast stations, but only set aside a minority of channels for broadcasters. At the same time, to the extent the "paper-springer" hypothetical is based on the theory that the cost of an A/B switch and an antenna is the only reason cable households do not receive broadcast stations that are not carried by cable, that assumption seems questionable, since it overlooks the difficulties in maintaining and operating those devices in conjunction with cable boxes, televisions, and VCRs.

quire cable operators to devote a limited number of channels to certain viewpoint-neutral purposes. And as we have shown, the must-carry provisions closely fit the problems confronting Congress—the dropping of broadcast stations and their assignment to undesirable cable channels. Indeed, since the must-carry rules Congress adopted are no more restrictive than the alternative hypothesized by Judge Williams, he should have concluded that Sections 4 and 5 are not unconstitutional even if subjected to strict scrutiny.

* * * * *

In sum, Congress enacted Sections 4 and 5 in light of an extensive legislative record and findings showing that cable operators had the market power and the incentive to discriminate against their primary competitors, broadcasters—and that such discrimination was jeopardizing the continued availability of full broadcast service. The must-carry rules are narrowly tailored to address the anti-competitive behavior that Congress perceived, burden speech only minimally, and promote the First Amendment interests of viewers. The must-carry rules are constitutional.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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